IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 511

CITY OF MENASHA,

Petitioner,

vs.

CLARENCE FURTON, TRUMAN FURTON, LUKE FURTON, FRED FURTON, AND RALPH JOHNSON, CO-PARTNERS DOING BUSINESS AS FURTON BROTHERS CONSTRUCTION COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Subject Index.

Table of Cases Cited.

Rules Cited.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

City of Menasha, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on June 21, 1945, in Cause No. 8635 in which Respondents were Plaintiffs and Appellants, and Petitioner was Defendant and Appellee, reversing the summary judgment of the District Court of the United States for the Eastern District of Wisconsin, which dismissed the complaint of the Respondents as Plaintiffs, and remanded the cause to the District Court with directions to try all factual issues, specifically enumerating the same.

Summary Statement of the Matter involved.

Respondents, a firm of contractors, commenced action in the United States District Court for the Eastern District of Wisconsin against Petitioner, a municipal corporation, as Defendant, to recover damages in the sum of $100,994.71 for breach of warranty founded upon a written contract between plaintiffs and defendant for the construction for the defendant of a pre-settling basin to be used as a part of its waterwork's system at the total contract price of $78,000.00.

The project involved the excavation of a pre-settling or water basin, the construction of reinforced concrete and masonry walls, earth dike, chemical feed house and a 30″ pipe line from the pre-settling basin to the water purification plant, including all necessary coffer dams, and pumping, excavation and back-filling in accordance with plans and specifications which were specifically made a part of the contract by the terms thereof. (Contract 18-20; Plan R. 97; Specifications R. 20-36; Instructions to Bidders R. 17.)

The settling or water basin is a basin approximately 725′ on one side bounded by a road or land, and bounded on the other three sides for a length of approximately 1900′ by water, namely, an outlet creek, the Fox River, and a dredged channel. (R. 97.)

The basin was designed to permit the natural flow of water from an inlet creek or channel through a headhouse, in which the water was to be chemically treated, into the settling basin. Baffle walls were constructed across the basin to retard the flow of the water so that the algae which is abundant at certain times of the year, and other solid impurities would settle to the bottom. From the settling basin the water was to be pumped through a pipe line approximately 3500′ to the pumping plant for further

purification treatment and circulation through the mains to consumers.

Plaintiffs allege that the plans and specifications prepared by defendant's engineer and made a part of the contract by the terms thereof "represented that rock existed at an elevation therein specified, which representation was relied upon by the plaintiffs in entering into said contract with defendant". (R. 12.)

Plaintiffs allege the expansion of this representation in "that in the construction industry, by custom under similar circumstances it is understood, and the parties to the contract contemplated and understood, that the term 'rock' as used in said contract is synonomous with the term 'bed-rock'." (R. 12.)

Plaintiffs allege further that "the contract contemplated the excavation of soil and material to bed rock, which could be accomplished by the method commonly known as 'stripping' wherein the contractor would have a bed rock footing for his machinery and equipment". (R. 12.)

It is admitted that during the progress of the work it was discovered that rock did not exist at the elevation specified under some portions of the area of the basin.

Plaintiffs allege further that by reason of the non-existence of "bed-rock" at the elevation specified a method of performance of the work of excavating the basin different than that contemplated was necessary, requiring "different and heavier equipment and extensive pumping and drainage, the laying of road mats to support machinery and upon which to travel; the weather conditions greatly interfered with the progress of the work because of the absence of bed rock upon which the work as originally contemplated could have been performed under adverse weather conditions," the work was more expensive than

that contemplated, and they claimed as damages the difference between their alleged actual cost and expense and their estimated cost. (R. 12-13.)

The representations alleged are only such as exist in the plans and specifications. (R. 12.) The contract provides for excavation of the proposed area to rock. (R. 18.) The specifications provide for the excavation to rock which is at elevation 87.2′ or approximately 7′ below the crest of the Menasha dam. (R. 29.) The existence of rock is indicated on the plan. (R. 97.) Elevation drawing of the head house specifies elevation of the footing (not specifying the footing as rock) as 87.2′ with a plus or minus sign which clearly means "more or less". On elevation drawing of the baffle walls the elevation of the rock foundation is given at 87.16′± and in elevation drawing of the dyke at 87.2′±. There is no other indication of elevation of rock excepting for the pipe line which has no relation to excavation of the settling basin.

There is no reference to method to be employed by the Contractor in performing the excavation work, no indication that it could be performed by the "stripping" method. On the contrary, instructions to bidders provided as follows:

> "Bidders must satisfy themselves, by personal examination of location of the proposed work, and by such other means as they may prefer, as to the actual conditions and requirements of the work, and shall not at any time after submission of a bid dispute, complain, or assert that there was any misunderstanding in regard to the nature or amount of work to be done." (R. 17.)

The Specifications provided that bidders were "expected to compare the plans and specifications with the site". (R. 21.)

That is the full extent of the facts initially presented by plaintiffs to sustain their cause of action for breach of warranty.

In counter-affidavit submitted by plaintiffs on motion of defendant for summary judgment Luke Furton, one of the plaintiffs, deposes and says that he was present with defendant's engineer at a meeting of defendant's Water & Light Commission when the contract in question was executed, and "at said meeting and prior to the execution of the contract one of the commissioners inquired as to whether or not it was definitely known that rock underlay the entire area at the specified elevation, and as to what would be the result if it did not". (R. 69.)

Affiant states further that thereupon he, one of the plaintiffs, explained that if it should develop that the rock were found to be higher in some places it might involve excavation of rock, and if the rock were found to be lower it might involve more expense to excavate the earth; that it would be up to the engineer and that under the contract plaintiffs would be paid their extra expense for such work. (R. 69-70.)

Then affiant proceeds to state that thereupon the commissioner who first inquired as to the definiteness of the information in reference to the elevation of underlying rock suggested an adjournment of the meeting to permit more accurate determination of the location of the rock, the expense of test boring was discussed, and the idea of making test borings dropped; that it was stated that plaintiffs might be required to do considerable work, at cost, and without profit, and affiant stated that plaintiffs would have to take their chances and could not get badly hurt as long as they received their additional costs (reference to a provision of the contract theretofore mentioned and hereinafter quoted). (R. 70.)

The contract provides for the payment of 85% of the value, proportionate to the amount of the contract, of labor and materials incorporated in the work up to the first day of each month and on substantial completion of the entire work a sum sufficient to increase the total payments to 90% of the contract price, "and thirty (30) days thereafter, provided the work be fully completed, and the contract fully performed, and proof furnished by the Contractor that all bills for material and labor have been paid in full, the balance due under the contract". (R. 19.)

Plaintiffs allege only substantial completion of the work and admit non-completion of the work and non-payment of lien claims. (R. 14.) As justification for such defaults plaintiffs allege that the withholding of payment by defendant to plaintiffs caused a financial stringency, "rendered it impossible for the plaintiffs to proceed to complete performance of the contract" and to pay all bills for material and labor. (R. 14.) No demand for payment until March 4, 1943, is alleged. (R. 74.) Supposedly, financial stability of the contractors or adequate financial backing is established by the provisions of the specifications requiring the contractor to furnish performance bond with surety, breach of the terms of which specification cannot be assumed. (R. 34-35.)

The contract provides that the work shall be completed on or before the 30th day of June, 1942, "time being of the essence of this contract". (R. 18.) Claim was submitted March 4, 1943, and the work was then only substantially completed. (R. 74.)

Plaintiffs' pleadings and affidavits present these additional facts. They allege no difficulties that were encountered in erecting the foundations for the headhouse or for the dike, but they submitted proofs to show that difficulties were encountered in placing the foundations for certain baffle walls.

Plaintiffs presented copy of estimate which they submitted for extra work in trenching and lowering of baffle walls of $9107.00, (R. 76) and letter from defendant's engineer in reference thereto stating:

> "The total amount involved should not be any more than the total listed in your estimate, and as we understand it the rock pitches r ward towards the south, so that the depth of excavation and the depth of concrete should be less than that given in your estimate, as well as the amount of reinforcing and the amount of forms." (R. 77.)

They presented an additional letter from defendant's engineer stating:

> "This will confirm verbal conversation this morning. It has been decided to trench for the footings only for the baffle walls, so long as the foundation material is as satisfactory as that we looked at this morning.
>
> The writer is satisfied that the foundation which is hard pan, made of crushed stone and blue clay which acts like cement to hold it together, is good enough for a 4-story building, and we think it is foolish to go to the extra expense to go deeper. Therefore, unless you find a much softer material than that we looked at this morning, it will only be necessary to trench for the footings, which will make the top of the footings flush with the bottom of the rest of the basin." (R. 80-81.)

They presented further Estimate No. 9, approved by plaintiffs, showing allowance of extra item for this work in the amount of $3000.50. (R. 84.)

These proofs establish agreement between the parties as to the effect of the absence of underlying rock at the elevation anticipated and as to the amount of extra work occasioned thereby.

On motion for summary judgment defendant disputed none of the facts enumerated presented by plaintiffs. Defendant merely supplemented the facts presented by plain-

tiffs by the submission of uncontroverted additional facts, mostly in documentary form, which dovetail into the facts presented by plaintiffs and round out the picture.

Defendant submitted copy of the proposal made by plaintiffs in which plaintiffs certified that they had informed themselves fully "in regard to the conditions to be met" in execution of the contract. (R. 95.)

Defendant submitted the details in reference to the amount of unpaid lien claims. On October 15, 1942, unpaid lien claims were in the amount of $17,023.00 by plaintiffs' own statement to defendant in affidavit form. On February 1, 1943, unpaid lien claims amounted to $23,886.22; and since that time additional claims have been presented and all of said bills remain unpaid. (R. 55.)

Plaintiffs had submitted Estimate No. 9, dated October 3, 1942 (R. 84-85), which established that monthly estimates were submitted by defendant's engineer and approved by plaintiffs showing the amount of "labor and materials incorporated in the work" during the preceding month in accordance with the terms of the contract. Such estimate included "extras", and showed uncompleted excavation work in the amount of $1900.00. (R. 84.) Defendant added estimate dated December 2, 1942, showing uncompleted excavation work in the amount of $950.00 (R. 54), estimate dated January 2, 1943, showing uncompleted excavation work in the amount of $600.00 (R. 66-67) and estimate dated February 1, 1943, showing uncompleted excavation work in the amount of $330.00. (R. 68-69.)

The series of estimates demonstrated that estimates were made monthly and approved by plaintiffs, that performance of no amount of excavation work as alleged in plaintiffs' complaint was asserted, but performance of a negligible quantity of excavation work, that the amount of extra work performed or in process was shown but no extra for

excavation of the basin, or in other words, no suggestion of the claim asserted in plaintiffs' complaint was contained in the monthly estimates approved by the plaintiffs in writing up to February 1, 1943.

Defendant established by submission of estimate dated February 1, 1943, that total contract price and extras authorized up to that date amounted to $86,154.03. (R. 69.) Defendant asserted, and the facts were not disputed, that approximately $4500.00 remained unpaid on the original contract price, and $10,103.57 was retained (being the 15% retention provided by the contract) making the total sum of $14,603.57 withheld by defendant. (R. 47.)

Defendant submitted copy of notice dated December 29, 1942 (R. 61), from the attorney for defendant's Water & Light Commission to plaintiffs demanding prosecution of the work under penalty of having the contract declared in default in accordance with the terms of the contract, Section 10. (R. 23-24.) This was followed by similar warning from defendant's engineer dated January 1, 1943 (R. 62-64), and culminated in notice declaring the contract in default dated February 2, 1943. (R. 64-65.)

The provisions of Section 10 of the contract (R. 23-24) vested in the judgment of defendant's engineer determination whether or not the contract was "being executed in a sound and workmanlike manner" and specified the procedure for declaration of default which was followed. (R. 23-24.)

The facts hereinbefore summarized relate to the simple question whether or not the absence of meritorious cause of action for breach of warranty in plaintiffs was not established as a matter of law. The most important subject matter presented by this petition, however, is largely procedural. Therefore, a statement of procedural facts and certain related facts, which could not be under-

stood without the preceding statement of the basic facts follows.

Original complaint (R. 2-5) was dismissed on defendant's motion with leave to file amended complaint. (R. 10-11.) While the original complaint casually referred to provisions of the contract for compensation for extra work, direction by defendant's engineer in writing for performance of the work and presentation of claim by the 5th day of the month succeeding the month in which the work was performed (conditions precedent to recovery for extra work by the specific terms of the contract) (R. 25) are not claimed. (Par. 9, R. 3; Par. 10, R. 4) The complaint clearly attempted to set forth a cause of action for breach of warranty and made no attempt to state a cause of action for recovery of compensation for extra work.

Amended complaint was then filed containing identical allegations, with slight changes in verbiage, as to breach of warranty. (R. 11-15.) A new element—the suggestion, far short of the assertion of cause of action for recovery for extra work under the contract—was indirectly injected and that is the source of all of the subsequent trouble.

The contract provides for performance of four classes of work, (a) the basic work in accordance with the plans and specifications at a fixed price, (b) earth excavation and disposal added or subtracted at a unit price, (c) backfill added or deducted at a unit price, and a fourth class unlettered in the contract which we designate (d) extra work not covered by the foregoing unit prices for which the contractor was to receive "actual cost of material furnished and labor performed plus Fifteen (15%) per cent for profit, use of tools, equipment, job superintendent, timekeeper, and general supervision, and any other overhead and fixed charges." (R. 18-19.)

The amended complaint describes the work of excavating the basin after discovery of absence of rock at the elevation anticipated as work not included in classes (a), (b), and (c) of the contract for which fixed or unit prices were established (Par. 8, R. 12-13) but as included in class which we designate as (d) for which compensation was to be on the basis of actual expense. (Pars. 9-10; R. 13.)

The amended complaint then states that the plaintiffs duly made claim to defendant's engineer as provided in the contract and the claim was denied. (Par. 13, R. 14.)

There follows this deceptive and confusing paragraph:

> "The action of the engineer and the defendant in refusing to allow said claim and to ascertain, allow, approve, and certify for payment the amount due the plaintiffs for the said different work performed under the contract *pursuant to the engineer's direction in writing* was arbitrary and unjust and not in accordance with the contract." (The italics are ours for emphasis) (Par. 13, R. 14.)

Disallowance of the claim and non-payment thereof is then alleged as excuse for plaintiffs' non-completion of the work and their non-payment of lien claims. (Par. 13, R. 14.)

Motion by defendant to dismiss the amended complaint was denied, the Court in its opinion pointing out the provision of the contract relating to compensation for the performance of extra work upon express order of defendant's engineer in writing, and the allegation that defendant's engineer directed in writing performance of the work for which recovery was sought. (R. 39-40.)

Thereafter defendant moved for summary judgment supporting the motion by an affidavit of defendant's engineer that there was no order in writing for performance of the work. (R. 51.)

The Court granted the motion and judgment of dismissal of plaintiffs' complaint was entered (R. 99) and plaintiffs appealed from this judgment. (R. 101.)

The contract specifically provides that the contractor shall have no claim for compensation for extra or additional work, using the two terms synonymously, unless the same is previously ordered in writing by defendant's engineer, and unless the claim therefor is presented to defendant's engineer before the 5th day of the month following that during which each specific order is complied with. (R. 25.)

The amended complaint does not state that defendant's engineer ordered the work in writing. It merely infers that by stating that his refusal to allow claim for the work performed "pursuant to the engineer's direction in writing" was arbitrary. (R. 14.)

The amended complaint does not state that claim was presented to defendant's engineer before the 5th day of the month following that during which the work was performed, but it states generally that "plaintiffs duly made claim to defendant's engineer as provided in the contract". (R. 14.)

On motion for summary judgment with affidavit of defendant's engineer that there was no order in writing for performance of the work (R. 51) plaintiffs failed to produce such order.

There was no contradiction by plaintiffs of the facts demonstrated by the monthly estimates approved by plaintiffs hereinbefore enumerated that such estimates stated that the amount of extra work performed during the preceding month as well as work under the contract, and total excavation work from October 1942 until default of the contract on February 1, 1943 was negligible. The fact that claim was not made until after the contract was defaulted is verified by plaintiffs. (R. 74.)

The fact that extra excavation ordered by defendant's engineer in writing was restricted to trenching and lowering of baffle walls was established by plaintiffs. (R. 76, 77, 80-81, 84.)

The granting of defendant's motion for summary judgment was in effect an application of the law of the case which the court established by dismissal of the original complaint that the facts stated did not establish a cause of action for breach of warranty. (R. 7-11.) To this the Court must have added the determination that cause of action for recovery for extra work under the contract was not established.

On oral argument in the Circuit Court of Appeals counsel for appellants unequivocally stated that whether or not plaintiffs were entitled to recovery for breach of warranty was the sole issue and the Court took the matter under advisement with that understanding. (R. 130.)

On that record the Appellate Court held that it must accept the allegations of the complaint as true (R. 116), stated the rule to be "that a court must accept plaintiffs' fact allegations and statements in their affidavits and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them" (R. 118) and recognized as one of the bases of plaintiffs' claim the assertion by plaintiffs that defendant's engineer ordered the additional work when the error in the specifications as to the location of bed rock was discovered. (R. 116.)

The court holds that certain factual issues exist, and reverses the judgment with directions to try those factual issues first. The factual issues enumerated are as follows:

1. Were the bed rock representations in the drawings warranties upon which plaintiffs could and did rely in entering into the contract?

2. Was plaintiffs' failure to make the payments necessary for the completion of the contract excused (a) by defendant's failure to make all payments due the plaintiffs or (b) by the added cost and trouble traceable to the rock bottom representations?

3. Lack of written order by the engineer for the additional work and expense, or a waiver by the parties of such written order?

4. Other factual questions raised by the defendant, including controversy as to the completeness of the work and dispute as to time for completion of the work, specifically set forth by the court. (R. 118-119.)

Statement As To Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 21, 1945, (R. 120) rehearing denied July 17, 1945. (R. 155.) The jurisdiction of this Court rests on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Section 347).

Questions Presented.

1. Does Rule 56(c) of the Rules of Civil Procedure require that on motion for summary judgment by defendant the Court must accept plaintiffs' fact allegations and statements in their affidavits, and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them, as stated by the lower Court, or may the contrary facts be established beyond controversy by affidavits submitted by the defendant?

2. Upon reversal of summary judgment of the District Court dismissing an action, under Rule 56(d) of the Rules of Civil Procedure, should the Circuit Court of Appeals remand the action to try all issues without ascertainment, or ascertain, or make provision for ascer-

tainment, of such material facts as exist without substantial controversy?

3. Under the facts disclosed in the record is not recovery by plaintiffs for breach of warranty precluded as a matter of law?

4. Under the facts presented by the record, and the law, was the Circuit Court of Appeals correct in reversing the judgment of the District Court dismissing plaintiffs' complaint?

Reasons Relied On For Allowance of Writ.

1. This case presents an important Federal question under the summary judgment rule, Rule 56(c) of the Rules of Civil Procedure, determined by the lower Court in conflict with, or probably in conflict with, the decisions of this Court particularly in the case of *Sartor* v. *Arkansas Nat. Gas,* 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967.

The lower Court stated the rule to be that on motion by defendant for a summary judgment, the Court must accept plaintiffs' fact allegations and statements in their affidavits, and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them, excluding establishment of contrary facts beyond controversy by affidavits submitted by the defendant. Such statement of the rule is in conflict with, or probably in conflict with, the decisions of this Court.

2. This case presents an important Federal question under Section 56(d) of the Summary Judgment Rules which has not been, but should be, settled by this Court namely: Where the Circuit Court of Appeals reverses the judgment of the District Court which dismissed plaintiffs' complaint, should the Appellate Court remand the cause with direction to try all issues, as it did, or ascertain, or make provision for ascertainment, of material facts which exist without substantial controversy?

3. In holding that the alleged representations of elevation of underlying rock contained in the plans and specifications, under the facts and circumstances disclosed in the record, might constitute a warranty upon which plaintiffs could possibly establish a cause of action for breach of warranty, the Circuit Court of Appeals decided an important question of general law in a way in conflict with the decisions of this Court. The question whether or not a contractor for construction of a municipal project may recover if representations of the character alleged in this case prove false, upon the facts and circumstances disclosed in the record, is an exceedingly important question of general law which affects, or will affect innumerable contracts for large construction projects by various governmental units and private parties, particularly in the post-war building era which we are now entering.

The decisions of the Circuit Court of Appeals is in conflict with the decisions of this Court which established the law with certainty, and have been accepted generally by state as well as federal Courts throughout the country, as the leading cases on the subject, namely:

MacArthur Bros. Co. v. *U. S.*, 258 U. S. 6, 42 S. Ct. 225, 66 L. Ed. 433.

Simpson v. *U. S.*, 172 U. S. 372, 19 S. Ct. 222, 43 L. Ed. 967.

The statement of the rule is amplified in the decisions of this Court reaching opposite results in the cases of:

Hollerbach v. *U. S.*, 233 U. S. 165, 34 S. Ct. 553, 58 L. Ed. 898.

U. S. v. *Atlantic Dredging Co.*, 253 U. S. 1, 40 S. Ct. 423, 64 L. Ed. 735.

Christie v. *U. S.*, 237 U. S. 34, 35 S. Ct. 565, 59 L. Ed. 933.

These cases are distinguished in the *MacArthur* case, and by comparison of all five cases the character of the representations and the facts and circumstances necessary to establish a warranty and recovery for breach of warranty in this class of case made plain and the conflict with the decision of the lower court made apparent.

4. Reversal by the lower Court of the judgment of the district Court and remanding of the cause with directions to try all issues, including factual issues, established beyond controversy, issues specifically eliminated by the parties, issues designated by the Court as factual which are issues of law, and issues not even raised is so far a departure from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in Cause No. 8635 entitled *"Clarence Furton, Truman Furton, Luke Furton, Fred Furton and Ralph Johnson, Co-Partners Doing Business as Furton Brothers Construction Company, Plaintiffs-Appellants,*

v. *City of Menasha, Defendant-Appellee,*" and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioner will ever pray.

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IN THE

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OCTOBER TERM, 1945

No.

CITY OF MENASHA,

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vs.

CLARENCE FURTON, TRUMAN FURTON, LUKE FURTON, FRED FURTON, AND RALPH JOHNSON, CO-PARTNERS DOING BUSINESS AS FURTON BROTHERS CONSTRUCTION COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Circuit Court below is reported in 149 F. (2d) 945 and at R. 115-119.

Jurisdiction.

The statement concerning jurisdiction is set forth in the petition and is incorporated herein by reference.

Statement of the Case.

The statement of the case appears in the petition and is incorporated herein by reference.

Specifications of Error.

The Circuit Court of Appeals for the Seventh Circuit erred in the following respects:

1. In holding, in conflict with the decisions of this Court, that Rule 56(c) of the Rules of Civil Procedure requires that on motion for summary judgment by defendant, the Court must accept plaintiffs' fact allegations and statements in their affidavits, and only on the assumption of their verity, yet insufficient, may summary judgment be entered against them, excluding establishment of contrary facts beyond controversy by affidavits submitted by the defendant.

2. In reversing the judgment of the District Court with directions to try all issues without ascertainment, or provision for ascertainment, of material facts which exist without substantial controversy, contrary to the letter and spirit of Rule 56(d) of the Rules of Civil Procedure.

3. In holding (in conflict with the decisions of this Court) that the alleged representations of elevation of underlying rock contained in the plans and specifications, under the facts and circumstances disclosed in the record, might be held to be warranties and the basis for recovery by plaintiffs for breach of warranty.

4. In reversing the summary judgment of the District Court dismissing plaintiffs' complaint.

ARGUMENT.

I.

The Holding of the Lower Court that Rule 56(c) of the Rules of Civil Procedure requires that on Motion for Summary Judgment by Defendant the Defendant must Accept Plaintiffs' Fact Allegations and Statements in their Affidavits and Only on the Assumption of their Verity, Yet Insufficient, may Summary Judgment be Entered against them is in Conflict With the Decisions of this Court.

Rule 56(c) of the Rules of Civil Procedure provides in part:

> "... The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that except as to the amount of damages there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The holding of the lower Court is in conflict with the decision of this Court in the case of

> *Sartor* v. *Arkansas Nat. Gas*, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (cited with approval in *Associated Press* v. *U. S.* —*U.S.*—, 65 S. Ct. 1416, 89 L. Ed. 1512, 1515).

In this case this Court stated the correct interpretation of Rule 56(c) of the Rules of Civil Procedure as being that summary disposition should be on evidence which a jury would not be at liberty to disbelieve, and which would require a directed verdict for the moving party.

The meaning of the Court is clarified by its citation of *American Insurance Co.* v. *Gentile Bros. Co.*, (C.C.A. 5th) 109 F. (2d) 732, 735, in which is cited the case of *Port of*

Palm Beach Dist. v. *Goethals,* (C.C.A. 5th) 104 F. (2d) 706, 709, and by its citation of the case of *Wittaker* v. *Coleman,* (C.C.A. 5th) 115 F. (2d) 305, 306.

Application of the erroneous rule by the lower Court obviously resulted in the Court ignoring the fact that there was no order of defendant's engineer in writing directing performance of the work, a condition precedent to recovery of compensation for the work as extra or additional work pursuant to the contract. The great importance of this single fact in the ultimate result at which the Court arrived will be developed in a subsequent heading into which the subject fits more logically.

Application of this rule by the lower Court probably caused the Court to ignore facts submitted by defendant which supplemented facts presented by plaintiffs but appear to controvert such facts because with the supplementary facts the ultimate fact is contradictory to the fact inferred from the partial presentation. These facts will likewise be developed later.

II.

The lower Court Erred in Reversing the Judgment of the District Court with Directions to Try All Issues Without Ascertainment, or Provision for Ascertainment, of Material Facts Which Exist Without Substantial Controversy, Contrary to the Letter and Spirit of Rule 56(d) of the Rules of Civil Procedure.

Rule 56(d) of the Rules of Civil Procedure provides as follows:

> "Rule 56(d). CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it, and by interrogating coun-

sel shall, if practicable, ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy and direct such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly."

The District Court rendered judgment on the whole case dismissing plaintiffs' complaint. Therefore the occasion for it to ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted did not arise.

When the Appellate Court determined to reverse the judgment of the District Court the same situation was created as if the District Court had not rendered judgment on the whole case. Is not the Appellate Court then bound by the rule to ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted? Or is it then bound to remand the cause to the District Court with directions that afford to the District Court opportunity to make such ascertainment?

That question has not been, but should be settled by this Court.

Remanding the cause as the Lower Court did, with directions to try all issues, was either without regard to the letter and spirit of Rule 56(d) and the beneficial results intended to be accomplished thereby, or it was a determination that not a single material fact exists without substantial controversy, a situation which it will be demonstrated later herein is not present in this case.

III.

The Lower Court Erred in Holding that the Alleged Representations of Elevation of Underlying Rock Contained in the Plans and Specifications, Under the Facts and Circumstances Disclosed in the Record, Might be Held to be Warranties and the Basis for Recovery by Plaintiffs for Breach of Warranty.

MacArthur Bros. Co. v. U. S. 258 U. S. 6, 42 S. Ct. 225, 66 L. Ed. 433.

Where representations in the contract and specifications were alleged that a portion of the work would be done in the "dry" and a portion in the "wet" and to do the work in the "dry" the construction of certain coffer dams was specified and unanticipated conditions were met and performance of the work became more expensive than anticipated, demurrer to the petition was sustained and the ruling affirmed on appeal to this Court.

There was a similar statement to that in the proposal in the case at bar that the proposal was made with a full knowledge of the kind, quantity and quality of the plant, work, and materials required.

The Court commented:

> The Company's "investigation may or may not have been adequate. It, however, took its chances on that. But in reality there was no representation by the government nor is it alleged that the government had knowledge superior to the knowledge of the company. The latter acquired knowledge only by the aid of their divers as work progressed. Such being the situation does not the case present one of misfortune rather than misrepresentation?"

Simpson v. U. S. 172 U. S. 372, 19 S. Ct. 222, 43 L. Ed. 482.

This case involved the construction of a dry-dock and the excavation of the pit or basin for the dock. Borings to a depth of from 39 to 46 feet were made by the Navy Department and the result of these borings was delineated on a profile plan purporting to show the character of the underlying soil, and showed that the soil was stable and contained no quicksand. A copy of this plan was given to the Contractor before it submitted its bid. The location of the dry-dock was to be fixed by the engineer later.

The Court clearly defines the issue as being whether or not the United States by the written contract guaranteed the nature of the soil under the site of the proposed dock and assumed the entire burden which might arise in case it should be ascertained that the soil under the selected site differed to the detriment of the contractor from that delineated upon the plan. The Court failed to find "any statement or agreement, or even intimation that any warranty, express or implied, in favor of the contractor was entered into concerning the character of the underlying soil."

In the *MacArthur* case the Court distinguishes the following three cases where the opposite result was reached and warranties were found. These decisions point out the features or elements essential to the finding of a warranty, which are missing in the case at bar.

Hollerback v. U. S., 233 U. S. 165, 34 S. Ct. 553, 58 L. Ed. 898.

In this case the specifications contained positive representations as to the character of material to be encountered, and contrary thereto the contractor ran into crib work 4.3′ high consisting of sand logs filled with stone, a

structure erected by the same agency for which the contract on which the suit was based was being performed. The court distinguishes the *Simpson* case.

U. S. v. Atlantic Dredging Co., 253 U. S. 1, 40 S. Ct. 423, 64 L. E. 735.

In this case the Court characterized the representations as follows:

> "Representations made by the government were deceptive in that the test borings gave information to the government not imparted to bidders of materials more difficult to excavate than those shown by the maps and specifications."

Christie v. U. S. 237 U. S. 34, 35 S. Ct. 565, 59 L. Ed. 933.

In this case the Court pointed out "the time not being sufficient for the contractors to make their own borings, they relied upon the government borings."

The decision of the lower Court on the facts in the record in the case at bar is in conflict with the decisions of this Court. A review of those facts is contained under the following heading.

IV.

On the Facts Beyond Controversy Presented in the Record the Lower Court Erred in Reversing the Summary Judgment of the District Court Dismissing the Amended Complaint.

We summarize under this heading our comments on the facts, as the most concise and logical method of showing the relation of the facts to the matters to which we have hereinbefore referred. We use as subheads the factual issues enumerated by the lower Court as requiring determination in remanding the cause for trial.

1. Were the bed rock representations in the drawings warranties upon which plaintiffs could and did rely in entering into the contract?

On plaintiffs' own showing the representations were only those contained in the plans and specifications (R. 12), were approximations of the elevation of underlying rock relating particularly to the foundations upon which structures were to be erected and not to the floor of the basin (R. 97) and with no representations as to the method to be employed in performance of the work or conditions to be met in execution of the contract.

On plaintiffs' own showing they were required to inform themselves as to the actual conditions and requirements of the work (R. 17, 21) knew before the contract was executed that no test borings had been made, and that information in reference to the elevation of underlying rock was indefinite, and the defendant had no superior knowledge. (R. 69-70.)

Plaintiffs' complaint is only as to method of performance of the work, that it was more expensive than contemplated, and the difficulties are all related to the existence of a softer material, or the presence of more water than anticipated (R. 12-13) in the construction of a project surrounded on three sides by bodies of water and below the level thereof. (R. 97.)

To these facts plaintiffs added proofs that when the absence of rock at the anticipated elevation where some of the baffle walls were to be erected was discovered, they submitted an estimate of extra work in trenching and lowering of baffle walls of $9107.00 (R. 76), defendant's engineer foretold that the amount of work required would probably be less than estimated (R. 77), final directions in writing were issued by defendant's engineer that trenching for the footings only for the baffle walls should

be performed, in other words the foundations need not be lowered, or more excavation performed than in digging trenches in which the footings under the baffle walls were to be placed (R. 80-81) and that the final allowance for this extra approved by plaintiffs was only $3000.50 (R. 84) or less than one-third the original estimate as foretold by defendant's engineer.

By these facts alone plaintiffs established agreement that the result of the absence of underlying rock at the anticipated elevation required the performance of only extra or additional work in payment of which the plaintiffs accepted the sum of $3000.50. (R. 84.)

To these facts defendant added proof that in their proposal plaintiffs certified, before the contract was executed, that they had informed themselves fully in regard to the conditions to be met in execution of the contract. (R. 95.)

Consideration is necessary of non-completion of the work, non-payment of lien claims, and non-assertion by plaintiffs of any claim for a long time, all admitted by plaintiffs, with details supplied by defendant, but since the lower court treated these as separate factual issues, they are discussed later in this brief.

We submit that by dismissing the original complaint (R. 10-11) with substantially the same showing, the District Court established it as the law of the case that plaintiffs had no cause of action for breach of warranty; but regardless of the correctness of that contention, the finding of the lower court that a cause of action for breach of warranty may exist on the facts presented by this record is in conflict with the law on the subject, well established by the decisions of this court.

2. Was plaintiffs' failure to make the payments necessary for the completion of the contract excused (a) by

defendant's failure to make all payments due the plaintiffs or (b) by the added cost and trouble traceable to the rock bottom representations?

It will be noted that this question recognizes as a premise non-completion of the work and non-payment of lien claims. (R. 14.) Plaintiffs' alleged cause of action, however, rests on the premise that the work was completed and the contract performed, but at an added expense created by the alleged misrepresentation.

Reference to the contract establishes no right in plaintiffs to payment until completion of the work and payment of lien claims. (R. 19.)

So plaintiffs seek to excuse their delinquency by claiming that defendant's failure to pay plaintiffs caused financial stringency of the plaintiffs and made it impossible for plaintiffs to proceed and to pay lien claims. (R. 14.) Financial stringency is an untenable excuse in the face of performance bond with surety. (R. 34.)

The lower court extracts from those allegations the additional excuse (b) that the added cost and trouble traceable to the alleged misrepresentations prevented performance. But that is not the excuse the plaintiffs offer, or what the lower court meant because it describes plaintiffs' default as "failure to make the PAYMENTS necessary for completion of the contract" (R. 119) thereby placing plaintiffs' default and defendant's alleged dereliction on a dollar and cents basis, the non-payment of a specific sum or sums.

What did defendant owe? What could plaintiffs claim it owed?

Not a sufficient amount under the contract. The amount withheld (R. 47) was far less than the amount unpaid on lien claims. (R. 55.)

Not damages for breach of warranty. Such claim must be based on performance of the contract, admittedly not accomplished. Claim of non-payment of the very amount in litigation as a basic element of the right to recover that amount is fallacious reasoning in a circle.

Payment for extra or additional work under the terms of the contract is all that could be asserted. And thus the allegations of paragraph 13 of the amended complaint (R. 14) which we have termed "deceptive and confusing" entered into the consideration of the matter and led the lower court to a confused legal result, as we propose to demonstrate.

A claim for recovery for extra or additional work under the terms of the contract was never asserted by plaintiffs, either in the original complaint (R. 2-5), the amended complaint (R. 11-15), or in the Appellate Court. (R. 130.) The monthly estimates of work performed, approved by plaintiffs, establish lack of such claim throughout the progress of the work. (R. 84-85, 54, 66-67, 68-69.)

Defendant supplied some of the proofs that no claim was asserted until, pursuant to the contract, upon determination of the defendant's engineer and authority vested in him (R. 23-24), the contract was declared in default. (R. 61-65.)

Non-payment by defendant with no request or demand for payment, or even assertion of claim cannot be asserted by plaintiffs as excuse for plaintiffs' default.

Under the terms of the contract (R. 25) such claim could not be asserted in the absence of written order from defendant's engineer, and timely submission of claim, the absence of which were established beyond controversy. (R. 51, 74.)

The excuses urged by plaintiffs are not material factual issues.

3. Lack of written order by the engineer for the additional work and expense, or a waiver by the parties of such written order.

There is no factual issue as to written order as just stated.

Waiver by the parties of such written order is not pleaded, asserted or claimed by plaintiffs. The extent of their assertion is the indirect assertion (Par. 13, R. 14) of "the engineer's direction in writing" and when the existence of this writing was challenged (R. 51), it was not produced.

It was error on the part of the lower court to create out of such circumstances an issue as to waiver of written notice, not raised by the parties themselves. That error demonstrates the fallacy in reasoning into which the lower court fell by concluding that the allegations of paragraph 13 of the amended complaint (R. 14) were an assertion of claim for compensation for performance of extra or additional work pursuant to the contract, not only the assertion of excuse for non-completion of the contract and non-payment of lien claims as that paragraph plainly states. That fallacy is more conspicuous in view of the pronouncement by plaintiffs' counsel to the Appellate Court that plaintiffs were not asserting such claim. (R. 130.)

4. Other factual questions raised by defendant, including controversy as to the completeness of the work and dispute as to time for completion of the work.

There are no other material factual issues raised by defendant. Neither are the two specified by the lower court. Specification of two issues, and exclusion of specification of others, would lead to the conclusion that the lower court itself could point out no others.

Plaintiffs admit non-completion of the work and non-payment of lien claims (R. 14) and that is all that is material on that subject.

There is no substantial dispute as to time for completion of the work. The bare facts were referred to by defendant that the contract provided for completion on or before the 30th day of June, 1942, "time being of the essence of the contract" (R. 18), the contract was declared in default February 2, 1943 (R. 64-65) and on plaintiffs' own showing claim was submitted March 4, 1943 and the work was then only substantially completed and lien claims remained unpaid. (R. 74, 14.) Defendant presented proof that an extension of time for performance was granted. (R. 56.)

The time of performance is material in showing that while it was longer than contemplated, yet no claim for compensation as set forth in the complaint was asserted by plaintiffs during all the time that the work was in progress. That does not make the question of time of performance a material factual issue.

CONCLUSION.

Mindful of the rules of this Court, we have labored diligently to present the questions involved in as concise form as possible. Presentation of the questions are unusually involved with factual matters and the errors charged to the lower court have aggravated that involvement. The task has been difficult, and we hope, capable of accomplishment within the limitations prescribed by this Court.

We have attempted to demonstrate that important questions of federal procedure pertaining to the summary judgment rule are involved and that the alleged errors of the lower court are more than a misinterpretation of well established and important legal principles but amount to a departure from the accepted and usual course of judicial procedure, an assertion which is not extravagant, if this Court will envision what would happen when this case reached trial before the District Court with the directions issued by the Appellate Court. The trial judge would be restricted from exercising his judgment in determining certain material facts in reference to which no additional proofs can be offered because the Appellate court had directed that all facts were in issue and such a trial would be contrary to all orderly judicial procedure.

Respectfully submitted,

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(9)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 511.

CITY OF MENASHA,
Petitioner,

vs.

CLARENCE FURTON, TRUMAN FURTON, LUKE FURTON, FRED FURTON and RALPH JOHNSON, Co-Partners, Doing Business as FURTON BROTHERS CONSTRUCTION COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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INDEX.

Synopsis.

The pleadings and affidavits present a genuine issue for a court or jury.

Table of Cases.

Wisconsin Statutes.

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OPINION BELOW.

The opinion of the Circuit Court below at Tr. 115-119, also 149 F. (2d) 945.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347a).

QUESTION PRESENTED.

Does the record make a proper case for summary judgment?

The Circuit Court of Appeals held it did not.

NO SUFFICIENT GROUNDS FOR CERTIORARI.

Rule 38 of this Court holds:

> "* * * A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

(1) The decision of the Circuit Court of Appeals presents no conflict of decisions. It follows the decision of this Court in **Sartor v. Arkansas Nat. Gas**, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967.

(2) It presents no issue of general public importance.

(3) The record discloses a controverted issue of fact.

The Court of Appeals, in its decision (Tr. 118, 119), found a controversy existed for a jury as to:

(a) The completeness of the work,

(b) The failures of payments and their causes,

(c) The added cost and the trouble traceable to the rock bottom representations,

(d) Lack of written order by the engineer for additional work and expense,

(e) The waiver by the parties of such written order,

(f) The nature and character of the rock bottom representations,

(g) Misrepresentations as to the bed rock,

(h) Failures to meet the terms and conditions of the contract and their excuses.

ARGUMENT.*

A.

The City of Menasha is the owner of a water utility. The city is one of a cluster of five cities (Fond du Lac, Oshkosh, Neenah, Menasha and Appleton) in the Lake Winnebago region.

The respondents were the successful bidders to build for the City of Menasha a pre-settling basin and a 30-inch pipe some 3600 feet in length, connecting the basin with its filtering plant. The supply of water to come from Winnebago Lake over to Menasha Dam, the crest of which is 94.2, more or less, feet above the sea level.

The water in the Winnebago area has a mossy condition, a vegetation which grows in the water during the hot and dry period of the summer when the water is low and practically dormant in Lake Winnebago. The vegetation thrives and pollutes the water. The purpose of the pre-settling basin is to harvest this crop of vegetation and remove it from the water, clearing it of the moss. The pre-settling basin approximately is a three-acre pit and 7 feet deep.

The contract called for the excavation of such a pit and the building of a control house and a 30-inch pipe 3600 feet in length and concrete baffle walls. The baffle walls, five in number, are concrete structures, sort of a zigzag affair, which cause the water to be evenly distributed during the period of sedimentation and equalize it as it enters the pipe on its way to the filtering plant. The baffle walls are higher than the water. The water enters the control house, at the northeast corner of the pre-settling basin, where it is first chemicalized. It then leaves the control house and enters the pre-settling basin, passes against,

*Unless otherwise indicated, emphasis supplied.

around and about the baffle walls, then into the pipe and from there to the filtering station to the southeast.

The respondents were the successful bidders and were given the contract to do that job for $78,000. The breakdown cost shows that two items were the principal ones—excavation, amounting to $33,600; and the 30-inch pipe, to cost $13,068. The contract had the following provisions:

> "(a) For the completion of all the work in accordance with these plans and specifications, the sum of Seventy-eight Thousand ($78,000.00) Dollars (Tr. 18).
>
> "(b) For earth excavation and disposal that may be added or **deducted**, the sum of Forty Cents ($.40) Dollars per cubic yard (Tr. 18). (Note the word deducted.)
>
> "For all extra work of every description, that may be ordered, not covered by the foregoing unit prices, the Contractor shall receive actual cost of material furnished, and labor performed, plus Fifteen (15%) per cent for profit, use of tools, equipment, job superintendent, time-keeper, and general supervision, and any other overhead and fixed charges" (Tr. 19).
>
> **"The Contractor and the Commission agree that the Specifications and Drawings, together with this Agreement, form the Contract, and that they are as fully a part of the Contract as if hereto attached or herein repeated"** (Tr. 19).

The specifications contain the following:

> "Contractors submitting bids or tenders on this work are expected to compare the plans and specifications with the site. Drawing No. 9605 accompanies these specifications" (Tr. 21). (The drawing is found on page 97.)
>
> "The Contractor is to be held responsible that the work to be done under these specifications is erected by him in strict conformity to the drawings, except as otherwise directed by the Engineer in writing; (Tr. 22).

". . . and the difference in expense occasioned by such increase, diminution or alterations so ordered and directed shall be **added** to or **deducted** from the amount payable under this contract; and the said Engineer shall ascertain the amount of such additions or deductions" (Tr. 25).

"Contractor shall excavate the settling basin area **to rock**, which is at elevation 87.2± or approximately seven feet below the crest of the Menasha dam" (Tr. 29).

It is our contention, as shown on this map (Tr. 97), that this pre-settling basin, to hold twenty million gallons of water, required the excavating of approximately 100,000 cubic yards in order to reach its rock base at 87.2 elevation. That under the contract, if for any reason the rock was found to be at a higher elevation, let us say, five feet rather than seven feet, there would be a deduction from the amount under subdivision (b) of the contract (Tr. 18).

There is a conflict of claims in forty instances, and although some of the controversies are not strictly germane to the issue, yet they are so interwoven that they must be considered in determining the genuine issue. Therefore a genuine issue.

The term "rock" was and is understood by the trade and those who understood its technical terminology, and was understood by the parties to the contract to mean "rock bottom," the map indicates that it was so held out to be. The petitioner denies by its answer that rock had such connotation.

To build a basin you start at a common point and dig to rock, covering an area on a ramp approximately thirty feet wide. After that you spread out and use the ramp for the trucks and work, having a solid bottom for your work. The tools and implements and trucks necessary for hauling the dirt out of such a basin is a matter of calculation and very easily accomplished and is made the basis for computation when bidding for the job.

The work was commenced as the contract provided, seven days after the 17th day of December, 1941, and to be completed on or before the 30th day of June, 1942. The advantage of starting work in the winter is that the soil is hard and if the rock had existed in the bottom of the basin the excavation could have been completed during the freezing weather, giving the respondents frozen soil to ride the trucks over to the dump and the job of excavating would have been finished before the rainy season.

No rock was found except one little ledge of about four to five inches thick and about 100 feet in diameter. A rather small portion of the excavation was done, to-wit: the entire job was approximately 30% and the excavation about 15% complete when it was discovered that there was no rock. While working on this ledge the respondents excavated 369 yards at a cost of 33¢ per yard to themselves, and on December 21st, 1942, they had already excavated 107,964 cubic yards and the cost had risen to $1,065 per cubic yard (Tr. 71).

When it was discovered that there was no rock, two test pits were dug by and under the direction of the city's engineer and hand shoveled three feet below the supposed seven foot rock level. There was no rock to be found. The cost of $33,600 for excavation was calculated by the respondents on a basis of 100,000 cubic yards. Due to an absence of a rock bottom the respondents, under direction of the engineer, were entitled to the increased cost plus 15%. The amount set up in the complaint was figured on the actual cost, without profit, for which the respondents furnished itemized forms from time to time to the petitioner. The extras in connection with the construction of the baffle walls is that in making them deeper than called for originally and a housemat for the control house was necessitated by reason of lack of a rock bottom. If there had been a rock bottom as relied on, the cost would have been as first estimated, because it would have

required less pumping over the part of the area covered by water, and after rock was struck the only pumping would be to take out the little seepage. With a rock bottom instead of mud and clay they would not have been obliged to rent and buy additional shovels and larger tools and trucks or incur additional loss of time and labor; besides, they would not have been impeded by the rainy season.

We call attention to a letter by the City's Engineer, in which the Engineer states (Tr. 77):

> "Referring to your estimate for extra work for trenching and lowering baffle walls, we wish to advise that the Menasha Electric & Water Utilities have decided to go ahead with this work on the basis of the unit prices set up in your estimate of March 13th. The total amount involved should not be any more than the total listed in your estimate, and **as we understand it the rock pitches upward towards the south,** so that the depth of excavation and the depth of concrete should be less than that given in your estimate, as well as the amount of reinforcing and the amount of forms.
>
> "Please consider this letter as authorization to proceed with this work."

The work was commenced at the northeast corner, the location of the head house and headed for the southwest corner. This was clearly misleading since there was no rock to pitch anywhere.

The Engineer knew what equipment the respondents possessed. He knew the basis for respondents' bid and the work it required at the time of the contract. He considered it adequate, and **it would have been adequate but for this error as to rock.** The respondents were caught by the error and were obliged to rent and buy new equipment and incur various costs because of that, all of which was itemized for the city from time to time.

The Engineer wrote (Tr. 79):

> "It is therefore imperative that you get another shovel on the job and some additional trucks so that this work can proceed more rapidly."

The original tools were not adequate.

The Engineer wrote (Tr. 80):

> "We understand that you plan to get an additional shovel to help you with the dyking, and in addition to this that you expect to go on a two-shift basis in the trenching across the park."

The Engineer wrote (Tr. 86):

> "Unless you find a much softer material than that we looked at this morning, it will only be necessary to trench for the footings, which will make the top of the footings flush with the bottom of the rest of the basin."

The Engineer knew that the respondents struck no rock and that it was a costly proposition (Tr. 83):

> "Here again they thought that your price was pretty high, but they feel that you have been having some tough breaks and they think that you are entitled to make a little profit on the rip rap" (Tr. 83).

And on Tr. 83:

> ". . . it is more important to get the excavation completed . . . ."

And on Tr. 86:

> ". . . you are hereby notified to prosecute this work and additions thereto so that it may be completed as promptly as possible."

The additions referred to were the deeper baffle walls and the head house mat because of no rock bottom.

We submit that a reading of the letters and directions by the Engineer to the respondents to continue with the work although they could have quit when they discovered there was no rock, or continue as they did by reason of the breach of an implied warranty, and under the contract recover their cost because of the extra work, tools, equipment, etc., to which they were put.

The respondents went broke on the job and finally were ordered off.

B.

PLAINTIFF'S LOSS DUE TO BREACH OF WARRANTY.

The work proposed to be done by the respondents was on the basis shown by the drawings and not upon the basis of conditions undisclosed to them.

The contractor relied upon information furnished and was misled by the erroneous specifications and deceptive drawing.

Christie v. United States, 237 U. S. 234, 59 L. Ed. 933, the classic case on the subject, was an action for damages in excess of $200,000 against the Government, growing out of a contract in the construction of locks and dams in Alabama. One of the items was greater expense of excavation and pile driving, due to misrepresentations of the materials in the specifications and drawings: increase in excavation, due to the "angle of repose" fixed by the officer in charge. One of the items considered by the Court was (quoting from page 935):

> "(1) This item is based on a charge of erroneous and deceptive borings and misrepresentations in the specifications and drawings.
>
> "By paragraph 48 of the specifications it is, among other things, provided: 'The material to be excavated, **as far as known** (emphasis ours) is shown by borings,

drawings of which may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material.' "

Notwithstanding it was claimed by the contractor that the statement in the specifications was untrue and misleading, causing him to propose to do the work upon the basis shown by the drawings, and not upon the basis of the more difficult and expensive work; that the contractor relied upon information thus furnished and was misled by the erroneous and deceptive drawings. The Court found that the contractor was justified in reliance upon the drawing in making the bid.

"It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive."

And there was also a finding that the "angle of repose" did not take into consideration **the abnormal conditions encountered during the work.** Floods, freshets and unlooked-for rises of the river were more numerous and of greater height and of longer duration than theretofore disclosed by the official records of the engineer's office relating to the river. The specifications provided also:

"All excavations shall conform to such lines, slopes, and grades as may be given by the engineer officer, and anything taken out beyond such given limits will not be paid for by the United States . . . ."

The Court saying:

"For the error in not allowing the demand of the greater expense of excavation and pile driving, due to the misrepresentation of materials in the specifica-

tions and drawings, the judgment is reversed and case remanded for further proceedings in accordance with this opinion" (page 939).

Hollerbach v. U. S., 233 U. S. 165, 58 L. Ed. 898;
Spearin v. U. S., 248 U. S. 132, 63 L. Ed. 166-9-70;
U. S. v. Atlantic Dredging Co., 253 U. S. 1, 64 L. Ed. 73-5-8.

In the **Christie v. U. S.** case (supra) the Court held as error not to allow the demand of greater expense of excavation and pile driving due to misrepresentations of the materials in the specifications and drawings.

The City was acting in a proprietary capacity and its contracts are governed by the same rules as contracts made between individuals.

In **Maney v. City of Oklahoma City, 300 Pac. 642, 76 A. L. R. 258,** a contractor employed by the municipality in the construction of a waterworks plant, contracted to excavate a by-pass and in so doing he encountered a large quantity of rock which was unexpected by the contractor and the city. He incurred an extra expense over and above that which was represented by defendant city and its engineer, by its plans, specifications, maps and borings. The contractor having relied upon the city's plans and specifications, etc., he was entitled to recover, and from a judgment in favor of the city which was reversed by the Supreme Court of that state, and quoting from the contract (see pages 262, 263 and 265), similar to the contract and specifications in our case, the Court said, on page 265:

> **"The city, in erecting its waterworks system, was acting in a proprietary capacity and not in a governmental capacity, and its contracts are governed by the same rules as contracts made between individuals."**

And on page 267:

> "A different rule applies where the contractor must build and complete a structure according to the plans

and specifications by the owner. **The contractor will not be required to bear extra expense resulting from the performance of the contract on account of defects in the plans and specifications prepared and submitted by the owner.''**

And the general rule is laid down in the annotations on page 269:

> ''The general rule may be deduced from the decisions that where plans or specifications lead a public contractor reasonably to believe that conditions indicated therein exist, and may be relied upon in making his bid, he will be entitled to compensation for extra work or expense made necessary by conditions being other than as so represented.'' (Citing numerous United States Supreme Court and Federal cases, including the classic case of Christie v. United States, 237 U. S. 234.)

It is the general rule that where a contractor is led to believe that certain conditions exist and may be relied upon in making his bid, he will be entitled to compensahion for extra work or expense made necessary by conditions being other than as represented.

It is contended that because of the following language in the instructions to bidders (Tr. 17):

> ''(c) Bidders must satisfy themselves, by personal examination of location of the proposed work, and by such other means as they may prefer, as to the actual conditions and requirements of the work, and shall not at any time after submission of a bid dispute, complain, or assert that there was any misunderstanding in regard to the nature or amount of work to be done.''

And in its proposal (Tr. 95):

> ''Having carefully examined the Advertisement, Instructions to Bidders, **Contract Agreement**, General

Conditions, **Specifications**, Bonds, and **Plans** for the proposed work, and having informed ourselves fully in regard to the conditions to be met in its execution, the undersigned proposes, etc."

In the first place, the examination of the location did not require him to engage in independent exploration. The general clauses do not overcome the implied warranty. The obligation to examine the side did not impose upon the respondents the duty of making a diligent inquiry into the history of the locality with a view of determining, at their peril.

In **United States v. George B. Spearin, 248 U. S. 131, 63 L. Ed. 166**, the Court said, on page 169:

"**This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work** . . . (citing Christie v. United States, the leading case, and others), where it was held that the contractor should be relieved if he was misled by erroneous statements in the specifications. . . .

". . . **This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality, with a view to determining, at his peril, whether the sewer specifically prescribed by the government would prove adequate.** The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

"Neither Sec. 3744 of the Revised Statutes (Comp. Stat. 1916, Sec. 6895), which provides that contracts of the Navy Department shall be reduced to writing, nor the parol-evidence rule, precludes reliance upon a warranty implied by law."

In **Bentley v. State, 73 Wis. 416**, the state, in building the capitol had warranted the sufficiency of the original plans, and therefore became liable for any additions to which Bentley was put. The Court, on page 430, used the following language:

"In other words, the contention is that the plaintiffs assumed the risk of the sufficiency and efficiency of the plans and specifications, and the materials and workmanship thus exacted, approved, accepted, and paid for by the state; and hence must suffer and make good the loss occasioned by such defects. . . . The fall was not the result of inevitable accident, as in several of the cases cited by counsel . . . it was in consequence of inefficient and defective plans and specifications therein mentioned. **According to such allegations, we must infer that there was in such agency of the state a lack of learning, experience, skill, and judgment to draw adequate and efficient plans and specifications for a building of that magnitude.** But, as observed, the state, through its own chosen agency, undertook to furnish, for the guidance of the plaintiffs, 'suitable and proper plans, drawings, and specifications for the construction' of such buildings, and then bound the plaintiffs to build according to them unless otherwise directed by its architect. Under the allegations of the complaint, we must assume that such inefficiency and defects were not patent to an ordinary mechanic, but were, as to the plaintiffs, latent."

In the Bentley Case the specifications contained language in many respects similar to the specifications here, to-wit: The **accuracy of it was not guaranteed**; the city

should not be liable for any extra work in removing more than indicated in the drawings; the contractors were to take out their own quantities, and to satisfy themselves as to the nature of the ground through which the foundations were to be carried; that no surveyor was authorized to act for the city, and that no information given was guaranteed; that the contractors were to assume all risks and responsibility in the sinking of such caissons, and to employ their own divers or other efficient means for removing and overcoming any obstacles or difficulties arising in the progress of the work; that the quality of the concrete was put under the control and direction of the engineer; that extra or varied work was to be certified, accounted, and paid for at prices named. It was after the contractor undertook the work that he discovered that the caissons were not sufficiently adequate for the purposes and required alterations and additions which occasioned loss of material and work and extra material and work and considerable delay. Quoting from the Thorn Case, the Court found, on page 433:

> "The question presented was whether there was any implied warranty on the part of the city that such caissons would prove efficient to shut off the water while building the piers."

It seems reasonable that the contractor should rely implicitly upon the direction of the engineer with regard to a question that was solely one of engineering.

In **City of Wheeling v. John F. Casey Co., 74 F. (2d) 794 (4 C. C. A.)**, in an action similar to the case at bar, the Court said, on page 796:

> **"That the mistake was not intentional seems clear, and it is contended on behalf of the city that the plaintiff, having contracted to construct the project according to the plans and specifications, should have**

discovered the mistake before beginning the work. On this point we agree with the judge below that the question as to whether the plaintiff in the exercise of reasonable care should have known of the mistake was one for the jury. . . .

". . . It seems to us reasonable that the contractor should rely implicitly upon the direction of the engineer with regard to a question that was solely one of engineering.

"We are unable to adopt the view that because of these provisions plaintiff was deprived of the right to rely upon representations of fact. While defendant refused to guarantee the absolute accuracy of the profiles or the results of the borings as shown thereon, it did state as facts that the borings were actually made, and 'for the information of the contractor' the results appearing on the profiles were 'reasonably correct.' There was an **implied warranty of the verity of those statements**, and similarly that the results plotted on the profiles were 'reasonably correct,' subject, of course, to errors of the employes of the city—not bad faith—in observing and recording the results."

There was an implied verity of those statements, and similarly that the results plotted on the profiles were "reasonably correct."

In **Pitt Const. Co. v. City of Alliance, Ohio, 12 F. (2d) 28 (6 C. C. A.)**, the blue prints for the construction of a coagulation basin showed one distance from the surface to the bottom while the facts were quite different, and it was contended by the city:

"(1) That the blue prints did not amount to a misrepresentation of fact. (2) That the contractor assumed the risk of any such error. (3) That the contractor, at the time of making the contract, was chargeable with notice of this error, and could not rely upon it. (4) That the claim was barred by the arbitration provisions of the contract."

In the case at bar (4) would be that the claim was barred by the rulings of the engineer.

The Court said, on page 30:

> "It is urged that the contractor's duty to examine the premises carried an assumption by him of the risk that there might be an error of the class which developed. We think this contention unsound. Perhaps the contractor by the use of sufficient instruments and effort, or by reference to whatever elevation datum may be the accepted starting point in that locality, could have ascertained that an elevation of 1026 feet above sea level would have been 3 feet below the ground and not 9 feet below, at the point indicated for the forward bottom corner of the structure. Perhaps not. Surveyors often disagree to that extent. So, too, in the case of Hollerback v. U. S., 233 U. S. 171, 175, 34 S. Ct. 553, 58 L. Ed. 898, the contractor need have sunk only five feet to ascertain that there was rock where the specifications showed there was not; but in this case, as in that, the contractor was entitled to accept, and to formulate his bid in reliance upon, the representation of fact by the other party. In substance and effect we cannot distinguish that case from this."

In **Palmberg v. City of Astoria (Ore.), 199 Pac. 630,** reported **16 A. L. R., page 1125,** both the cases and the annotations hold, page 1131:

> "In harmony with that view it has been held that a contractor may recover for extra work necessitated by mistake of the assistant engineer of a city in giving an insufficient depth for the excavation of a sewer trench."

In **Tomlinson v. Ashland County, 170 Wis. 58,** the Court said, on page 68:

> "The plaintiffs were entitled to rely upon what was in effect represented by such plans and specifications."

Citing the case of **Christie v. United States, 237 U. S. 234,** for its authority, and made the further comment (page 68):

> "The power to construe and define the intent and meaning of plans and specifications made a part of the contract is one thing, and may properly be, as it was in this instance, left to arbiters selected by the parties; the power to construe the contract itself and to determine what is within and what is without such contract is a different and independent question, and belongs primarily to the courts."

In **First Savings & Trust Co. v. Milwaukee County, 158 Wis. 207,** page 226:

> "Undoubtedly it was the duty of the county to cause to be prepared substantially complete plans and specifications before advertising for bids. It should also exercise good faith in making changes and could not make them simply for the purpose of favoring a contractor or of evading the statute. But neither our architects nor engineers have arrived at that stage of perfection where they can design great structures and unerringly provide for every detail of their construction. They overlook things, and occasionally they make mistakes where they do not overlook. Sometimes these mistakes may be serious. Then, too, we are moving all the time whether we are progressing or not. New and advanced ideas even in the matter of concrete construction might well be worked out during the life of the contract sued on. If the plans proved to be inefficient in some important detail, it would be serious indeed if the county were required to go on spending its money on what might prove to be a worthless structure, when the waste and loss could have been avoided at a moderate cost, or possibly at no cost at all. We cannot think the legislature ever intended to create such an intolerable situation."

On page 230:

> "The facts present a strong case for the application of the doctrine of waiver. There is evidence tending to show that the engineer gave peremptory orders which he refused to put in writing, claiming that he did not have to do so and that he would drive the contractor off the work if they were not obeyed, and that the committee as well as the assistant district attorney upheld him in his position."

And on page 231:

> "The county in the first instance might have contracted that the required notice need not be in writing. It might modify the contract in this regard if it saw fit. No good reason is apparent why it might not waive it. Municipalities, and particularly cities, are continually entering upon new enterprises which often require the expenditure of large sums of money for construction work. They are building, acquiring and extending waterworks plants, lighting plants, telephone lines, and some of them have gone into the street railway business. They must construct school houses, court houses, city halls, streets, sewers, and such like. In doing this work they aim and from a practical point of view are obliged to carry it on much the same as individuals would. In dealing with their contractors and employees it woud seem reasonable that they should be subject to substantially the same rules of law that govern private individuals."

C.

THE RECORD ON ALL THE MATERIAL ISSUES PRESENTS A GENUINE ISSUE.

I.

The Pleadings.

Defendant, in paragraph 3 of its answer, alleged:

> "Denies that it has **information sufficient to form a belief** as to the truth of the allegation that plaintiffs

learned that there was no bed-rock at or near the elevation specified in the contract after such work was under way" (Tr. 41).

And in its answer, paragraph 7:

"Admits the allegation contained in paragraph 11, that the cost of excavating such pre-settling basin had been estimated by said engineer and admits that the engineer's estimate for the excavation of such pre-settling basin was lower than the contractor's estimate. Alleges that the contractor made his own estimate of such cost in submitting his bid and denies that it **has information sufficient to form a belief** as to the truth of the allegation that the contractor's estimate of the cost of the contemplated excavation of the pre-settling basin was carried into, and was used in determining the amount of the plaintiff's bid, or that such estimate was the sum of Nineteen Thousand, Nine Hundred Eighty Dollars and 20/100 ($19,980.20) . . ." (Tr. 44).

And by paragraph 8:

"Denies that the defendant has **information sufficient to form a belief** as to the truth of each and every allegation contained in paragraph 12 of said complaint" (Tr. 44).

Paragraph 12 of the amended complaint (Tr. 14) is:

"The actual cost and expense to the plaintiffs in performing the said different or additional work in excavating the said pre-settling basin according to the directions of the engineer and under the conditions actually encountered was $120,974.91, which cost or expenditure was reasonably incurred under the conditions actually existing."

A denial by defendant on information and belief (Par. 3, Tr. 41, Pars. 7 and 8, Tr. 44), and an averment in the affidavit, "from said estimates it is **apparent** that no claim

was made for excavation work which was not included in the contract," are neither sufficient nor competent on a motion for summary judgment. **Walling v. Fairmont Creamery Co., 139 F. (2d) 318 (8 C. C. A.).**

The answer takes issue with the allegations in the amended complaint. It even takes issue with the allegations, Par. 6 of the amended complaint (Tr. 12), that the term "rock" as used in the contract, is synonymous with the term "bed rock" and so known and considered by the parties.

> "Where a technical term is used in a contract, and expert witnesses differ as to its meaning, and where the evidence relating thereto is in conflict, the meaning of such term becomes a question of fact for the jury to determine."
>
> **State v. Commercial Casualty Co., 248 N. W. 897, also in 88 A. L. R., page 790.**

We submit same are neither sufficient nor competent on a motion for summary judgment.

The engineer may not by his construction of the contract invade the province of the Court.

> "The construction, therefore, by the architects of the questions involved as to the right of the plaintiffs to charge for and recover for these two items, being an attempted decision on their part on a matter that was beyond their jurisdiction, is not binding on the parties nor controlling on the Court."
>
> **Tomlinson v. Ashland County, 170 Wis. 58-69.**

There a change was made in the plans indicating that certain of the columns or piers were to be of greater length than originally indicated, but no reference was made in such changed plan or notice of the difference in elevation of the surface soil or that any filling of material in or

around the building would be thereby rendered necessary. The contract provided that no alternations shall be made in work except upon written order of the owner and the architect. The Court said, on page 68:

> "The plaintiffs were entitled to rely upon what was in effect represented by such plans and specifications. . . .
>
> "The power to construe the contract itself and to determine what is within and what without such contract is a different and independent question, and belongs primarily to the courts.
>
> ". . . The knowledge on the part of all concerned that the work was being so done and it having been done in good faith and a reasonable amount only having been charged for it—all these conditions created a situation under which there arose an **implied obligation** on the part of the county to pay for such work" (page 69).

See, also:

Shine v. Hagermeister R. Co., 139 Wis. 343.

See Annotations 137 A. L. R., beginning page 530, and for Federal cases, pages 536 to 540, where the rule is laid down,

> "that if the decision amounts to a construction of the contract (the court also having to determine this question) it is not binding and does not preclude the court from reconsidering and determining the dispute,"

the decision that extra cost not payable held to be one of construction of contract and therefore not binding (page 536).

II.

The Affidavits.

(a)

The City's and Petitioner's Affidavits.

The affidavits are without any fact not covered by the denials in their answer. Mere assertion that the plaintiffs were without instructions to perform the work required by the uncontemplated changed conditions and therefore leave no issue of fact for determination by the court upon a summary proceeding.

(b)

The City's and Petitioner's Two Affidavits Are Met by the Affidavits of the Plaintiffs and Respondents.

(Tr. 69 to 96, inclusive.)

The pertinent parts at issue are as follows:

(a) The engineer, Orbison, informed Luke Furton, "That rock was known to exist at the elevation shown on the plans on all sides of the area to be excavated" (Tr. 69).

(b) That prior to the execution of the contract inquiry was made as to whether or not it was definitely known that rock underlay the entire area at the specified elevation, and as to what would be the result if it did not (Tr. 69).

(c) That if the rock were found to be lower it might involve more expense to excavate the earth (Tr. 69).

(d) That it would be up to the Engineer and that under the contract plaintiffs would be paid their extra expense for such work (Tr. 70).

(e) That defendant dropped the idea of test boring (Tr. 70).

(f) That it was discussed that the plaintiffs might be required to do considerable work without profit, but that plaintiffs would get their additional costs (Tr. 70).

(g) That the statement by the Engineer that he never authorized any extra, addition, or different work except two specified extras is untrue (Tr. 21). See Engineer's own estimate under date of October 3rd, 1942, which includes six extras (Tr. 84, 85).

(h) That the job was approximately 30% complete and the excavation about 15% complete when it was first discovered that rock did not exist at the elevation shown on the plans under some of the area to be excavated (Tr. 71).

(i) That plaintiffs thereafter notified the engineer and under his direction a test pit was sunk to determine the location of the rock. That no rock was found in said test pit (Tr. 72).

(j) That the contract called for baffle walls to be erected upon the rock supposed to exist at the level of the bottom of the basin (Tr. 72).

(k) That the Engineer then stated that the baffle walls could be erected on foundations placed in trenches in the soil instead of on rock and directed a submission of an estimate of the extra expense thereof (Tr. 72).

(l) That at the time of the estimate it was not known what additional expense would be incurred by reason of the absence of rock at the expected elevation, except that it would cost many times more where the rock was not present (Tr. 72).

(m) That the plaintiffs submitted an estimate as requested by the Engineer for the different work required to be done in erecting the baffle walls, which involved a **known amount** of earth excavation, and **known amounts** of concrete, reinforcing and forms (Tr. 72).

(n) That the Engineer set up a specified extra for the different work on the baffle walls, the extent and cost of which **was known and agreed upon** (Tr. 72).

(o) That upon all other different or additional work required to be done except the extra expense of excavating the portion of the basin not underlaid with rock, the extent and nature thereof **being known** the parties agreed upon the additional cost, and six extras were set up and progress payments made (Tr. 72, 73).

(p) That the Engineer continuously urged the speeding up of the work of excavating that portion of the basin not underlaid with rock, and repeatedly confirmed the direction by letter (Tr. 73).

(q) That the Engineer was continuously present and knew and examined the cost sheets in excavating for doing the extra work (Tr. 73).

(r) That the Engineer knew that a large amount of work was being done and assured the plaintiffs that the same would be paid for, and that the Engineer knew that unless they were paid for extra expense the plaintiffs would go bankrupt (Tr. 73).

(s) That the work done in excavating the portion of the settling basin not underlaid with rock differed from the work of excavating to rock specified and required different equipment (Tr. 74).

(t) That when the work was substantially done and completed in February, 1943, the Engineer was presented with a statement of added expense (Tr. 74).

(u) The letters of February 17th, 1942, and March 13th, 1942 (Tr. 75, 76), referred to estimates of extra work.

(v) The letter of March 26th, 1942 (Tr. 77), clearly indicates that neither party knew the exact depth of the rock. Quoting the Engineer:

> "The total amount involved should not be any more than the total listed in your estimate, and as we understand it the rock pitches upward towards the south, so that the depth of excavation and the depth of concrete should be less than that given in your estimate, as well as the amount of reinforcing and the amount of forms."

It is convincing that the Engineer was surprised that "rock bed" was other than noted in the specifications and believed that rock would be found as specified; because of that the estimate by him for extras was at that time less than the estimate made by the plaintiffs. Because they accepted the engineer's assurances, the plaintiffs made their estimate upon the representations of the Engineer and upon the belief induced by the Engineer as to where the rock bottom was, which, of course, turned out to be otherwise.

We call attention to the letter of April 30th, 1942 (Tr. 78), by the Engineer.

> (1) "We suggest that you keep careful track of the extra cost due to rock excavation for this pipe line, so that we can check with you in time for the Menasha Water & Light Commission meeting which will be Monday afternoon at four o'clock" (Tr. 78).

And again in the letter of May 5th, 1942, the Engineer wrote:

> (2) "We talked with you over the 'phone and understood you to say that, although you figure this is a pretty small unit price, you would be willing to accept it rather than to attempt to do this work on a cost-plus basis provided in the contract" (Tr. 79).
>
> ". . . There still remains to be taken out of the basin area approximately three times as much as you took out last month . . . ."

And in the letter of May 16th, 1942:

(3) "Therefore, unless you find a much softer material than that we looked at this morning, it will be necessary to trench for the footings, which will make the top of the footings flush with the bottom of the rest of the basin" (Tr. 80).

And on June 2nd, 1942:

(4) "**Confirming verbal instructions** given you yesterday, we have been informed over the telephone that the Menasha Water & Light Commission passed a resolution instructing you to deposit excavated material from the pre-settling basin across the road in the triangular space owned by the Park Board, originally specified" (Tr. 81).

On August 11th, 1942, the Engineer wrote as follows:

(5) "In the line of conversation this afternoon, please be advised that the Water & Light Commission decided to riprap both the roadside of the settling basin and also the dredge bank side.

"**Here again they thought that your price was pretty high, but they feel that you have been having some tough breaks and they think that you are entitled to make a little profit on the riprap**" (Tr. 83). (Our emphasis.)

The estimate of October 3rd, 1942, was a joint estimate by the plaintiff and the engineers.

On October 5th, 1942, the Engineer wrote as follows:

(6) "(2) They would like to hold up Extra No. 6 involving approximately 4,000 yards of riprap at $1.50 a yard. They feel that it would be a mistake to place this riprap on new ground; that the grounds should be permitted to settle first, and they would like to wait and see how it looks and will decide whether or not they want to proceed with this Extra at a later date.

"(3) The Commission also noticed the thing that the writer spoke to Eddie about Saturday afternoon, namely, that the riprap on the west side of the dike does not go down deep enough. This should be extended down till the level shown on the plan, so that it will have a good foundation and not slide down at the first freeze and thaw" (Tr. 85).

On November 25th, 1942, the Engineer wrote as follows:

(7) **"In accordance with the request of the Commission you are hereby notified to prosecute this work and additions thereto so that it may be completed as promptly as possible"** (Tr. 86, 87).

(c)

City's and Petitioner's Reply Affidavit.
(Tr. 52 to 55.)

The substance:

1. That up to and including the Estimate No. 13, made on February 1st, 1943, the plaintiffs at no time made any claim for any extra, additional or different work of excavation (Tr. 54); and then recites and draws his conclusion:

"From said estimates it is **apparent** that no claim was made for excavation work which was not included in the contract."

2. That under the provisions of the contract any claims for extra work were required to be filed by the 5th day of the month succeeding the month in which such work was performed.

"Affiant further states that the letter of May 16, 1942, to plaintiffs from affiant, attached to affidavit of Fred Furton, filed herein, was written after it was discovered that under the places where certain baffle walls were to be erected, as shown on the plans and specifications, there was not a firm foundation, and

after a discussion of the matter it was determined that the footings under the baffle walls should be lowered, requiring the excavation of more material and more concrete, and the letter of May 16, 1942, directed plaintiffs only to trench for the baffle walls, and make no other changes from the plans and specifications" (Tr. 54, 55).

3. **"That as a matter of fact plaintiffs did not excavate the basin to any greater depth than the depth indicated on the plans and specifications, and as originally contemplated"** (Tr. 55).

A clear issue of fact as to how much was actually excavated.

(d)

The Plaintiffs' and Respondents' Reply Affidavit.

(Tr. 87 to 92.)

Substance:

(1) That Item No. 4 was a different work, excavating rock instead of earth (Tr. 88).

(2) That the Engineer verbally directed plaintiffs to proceed with the excavation of such rock and to keep a careful record of cost thereon so that the same could be ascertained or determined as provided in the contract. This verbal agreement was confirmed by letter on April 30th, 1942, and the Engineer examined the plaintiffs' record of cost of excavating of rock (Tr. 88).

(3) **That at all of said times it was not known to what extent rock existed in said pipe line trench as shown on the plans.** No one knew the number of yards of rock which would have to be excavated (Tr. 88).

(4) That on November 10th, 1942, the Engineer directed in writing that the stone wall is to be "in place of the 12 inches of riprap on both sides of dike originally shown on the plans" (Tr. 89).

(5) That the Engineer frequently assured affiant that they could expect fair treatment from the commission on account of the conditions encountered in the basin and the project of adding this riprap was made by said Engineer as shown by his letter for the purpose of providing plaintiffs with additional funds immediately and with same profit on their operations (Tr. 89).

(6) That the estimates approved by the Engineer for the extra work were signed by the plaintiffs to provide a claim and the plaintiffs were powerless to make any claim in said estimates not submitted by the Engineer (Tr. 90).

(7) "Affiant states that it never made any claim in writing to the Engineer or Defendants for any extra and additional work until February, 1943, and that all payments made prior to that time were made pursuant to the Engineer's estimates, and that no claim was made on account of the different cost of work in the excavating of the pre-settling basin because until that time it was not known what the extent of such different work would be and it was not known what the extra cost of said work would be. That affiant promptly upon completion of such different work prepared and filed claim for the extra cost of such different work" (Tr. 90).

"This claim was held before the fifth of the month succeeding completion of the work. That it was well known to said Engineer Orbison and to the commission that said work was different from the work specified in the contract, to-wit, 'excavating to rock' and that the difference in said work did occasion Plaintiffs added expense, and that such added expense varied considerably with weather conditions and other conditions" (Tr. 90, 91).

"That from the time when it was first discovered that the rock did not exist at the level specified on the plans it was well known to all parties that the pre-

settling basin would have to be excavated, rock or no rock, or the entire project abandoned or reorganized" (Tr. 91).

Instructions to Bidders (Tr. 17):

"(c) Bidders must satisfy themselves, by personal examination of **location of the proposed work** . . ."

Proposal (Tr. 95) calls for the following:

"Having carefully examined the Advertisement, Instructions to Bidders, **Contract Agreement**, General Conditions, Specifications, Bonds and **Plans** for the proposed work, and having informed ourselves fully in regard to the conditions to be met in its execution, the undersigned proposes . . ."

Affidavit by the Engineer (Tr. 96). He personally supervised and directed the work in preparing the plan for a pre-settling basin, and that the plan (Tr. 97) is the only plan prepared for the construction of the pre-settling basin . . . that the identical plan was submitted to all bidders, together with the specifications upon which bids were taken and contract awarded on December 17th, 1941.

(e)

The Map.

(Tr. 97.)

An inspection of the map reveals the following:

Just below the north center, above what is described as Baffle Walls, see "Rock El. 87.16±."

In the center, at the right end of Section of Dike A-A, see "Rock 87.2±."

At the southeast end, to the left of El. B-B, Headhouse, see "Crest of Menasha Dam 94.23."

At the extreme east below the center, above the Section, see "El. 87.2±."

III.

Decisions.

The Circuit Court of Appeals correctly cited, read and followed **Sartor v. Arkansas Nat. Gas Corp., 321 U. S. 620, 88 Law Ed. 967**; and we cite from the Law Edition the majority opinion by Justice Jackson, page 971:

> "The defendant undertook to establish the absence of a triable issue by the affidavits of eight persons. It may be assumed for the purposes of the case that the witnesses offered admissible opinion evidence which, if it may be given conclusive effect, would sustain the motion. It will serve no purpose to review it in detail, and we recite only the facts which made it inconclusive . . ."
>
> "Much of the controversy, as will be seen from the prior history of the case, is over the question whether these contract prices may be used in aid of the plaintiffs' case. Defendant uses these contracts only to explain their prices away by showing differences in market conditions. They do not establish the claim that there is a wellhead market price."

On page 972:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. American Ins. Co. v. Gentile Bros. Co. (CCA 5th), 109 F. (2d) 732; Whitaker v. Coleman (CCA 5th), 115 F. (2d) 305. In the litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

On page 973:

"We think the defendant failed to show that it is entitled to judgment as matter of law. In the stipulation, the bulletin, the affidavit of the plaintiffs' attorney and the admission of its witnesses, there is some, although far from conclusive, evidence of a market price or a value, under the rules laid down by the Court of Appeals, that supports plaintiffs' case. It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner. The judgment accordingly is reversed."

* * * * * * *

"Rule 56 (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

"The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. Campana Corporation v. Harrison, 7 Cir., 135 F. 2d 334, 336. Because we think this record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted."

Burley et al. v. Elgin, J. & E. Ry. Co., 140 F. (2d) 488 (7 C. C. A.).

Summary judgment reversed.

"On appeal from an order granting a defendant's motion for summary judgment the circuit court of appeals must give the plaintiff the benefit of every doubt."

Walling et al. v. Fairmont Creamery Co., 139 F. (2d) 318 (8 C. C. A.).

Summary judgment reversed.

"The plaintiff insists that his complaint set forth a cause of action, that the answers of the defendants raise triable issues of fact, and that the District Court was not justified in concluding that 'no bona fide issue exists between the parties:' Consequently, we must determine if there is a genuine issue as to any material fact. Fletcher v. Krise, 73 App. D. C. 266, 120 F. 2d 809, 811."

Fishman v. Teter et al., 133 F. (2d) 222 (7 C. C. A.).

The complaint was unverified.

"As to the first question. The purpose of Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, was to enable the court to enter summary judgment when the pleadings and affidavits that may have been filed with the pleadings, clearly showed that there was no issue of fact to be tried. The court in such proceedings is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings. In the case at bar the Corporation alleged in its complaint that it bore the burden of the tax and that its dealings with the Sales Company were at arm's length. The Commissioner in his answer denied these allegations. This presented sharp, clear issues of fact. Affidavits were filed to prove and to disprove these issues of fact, and the court on these conflicting affidavits undertook to resolve the conflict. This action of the court was not proper on the motion for summary judgment. The affidavits did not demonstrate that there

were no issues of fact; they demonstrated that there were decided issues of fact. The Commissioner could not be foreclosed on the right to a trial on those issues by the entry of summary judgment."

Campana Corporation v. Harrison, 135 F. (2d) 334 (7 C. C. A.).

Summary judgment reversed.

Section 270.635 of the Wisconsin Statutes (summary judgment);
Prime Manufacturing Co. v. Gallun & Sons Corporation, 229 Wis. 349, 281 N. W. 697;
Sullivan v. State, 213 Wis. 185, 251 N. W. 251.

The rule is the same.

We submit that there is a genuine controversy between the parties which cannot be summarily disposed of on affidavits. The plaintiffs and respondents are entitled to their day in court, for the reason that a controversy exists for a jury as to:

(a) The completeness of the work,

(b) The failures of payments and their causes,

(c) The added cost and the trouble traceable to the rock bottom representations,

(d) Lack of written order by the engineer for additional work and expense,

(e) The waiver by the parties of such written order,

(f) The nature and character of the rock bottom representations,

(g) Misrepresentations as to the bed rock,

(h) Failures to meet the terms and conditions of the contract and their excuses.

CONCLUSION.

There are no questions of law involved, no issue of general public importance, no conflict of decisions, and **Sartor v. Arkansas Nat. Gas, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967,** is followed.

There is, however, a controversy of fact and, therefore, a genuine issue for a court or jury.

Respectfully submitted,

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November 1, 1945.

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